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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Appellants,

v.

STATE OF INDIANA, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Indiana

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16, move the Court to affirm the judgment of the United States District Court for the Southern District of Indiana.

REASONS FOR AFFIRMANCE

Introduction

Any analysis of the constitutional questions presented must begin with an in-depth understanding of the complicated provisions of Title V, § 501 *et seq.*, of the Surface Mining Control and Reclamation Act of 1977 [30

U.S.C. § 1251 *et seq.* (Supp. 1979)], which subtly, but quite directly, operate upon the States by dictating land use policies as well as governmental structures, procedures and criteria for making decisions on land use policies, all on pain of Federal usurpation. The Secretary continues before this Court, as the Secretary did before the District Court [relying mainly on the title of the Act and ignoring the challenged provisions] to mischaracterize the challenged provisions of Title V as, (1) being related solely to pollution control, with only incidental land use control and planning requirements, and (2) not being directed at the States, but solely at private mining operations.

Before addressing the questions presented, appellees will first demonstrate that provisions of the Act, which the District Court found to be contrary to the Tenth and Fifth Amendments as well as beyond the Commerce Clause power, operate on the States, and then demonstrate that the prime farmland and other provisions of the Act are related solely to land use control and planning, as opposed to interstate spill-over effects of water and air pollution.

Operation Of The Act On The States

Under the permanent phase of the regulatory scheme established by the Act, in order to retain jurisdiction over the regulation of surface coal mining and reclamation operations as well as the land use planning and control functions encompassed by the Act, each State must submit a State Program, including "a State law . . . in accordance with the requirements of this Act" and "regulations consistent with regulations issued by the Secretary pursuant to this Act," § 503(a)(1) and (7), or else those functions will be usurped by a Federal Program administered by the Federal Government,

§ 504(a). That is, unless a State submits a State Program by passing laws and promulgating regulations conforming to both the Act and the Secretary's regulations, the Federal Government will promulgate and administer a Federal Program for the State. Thus, on threat of Federal usurpation, in order to retain their sovereign land use planning and control functions, the States have no choice[1] but to exercise their legislative and executive powers by enacting laws and promulgating regulations containing land use policies as well as providing governmental structures, procedures and criteria for further land use decisions that are a mirror-image of those dictated by the Act.

Land Use Planning And Control Provisions

As found by the District Court, the "prime farmland provisions"[2] of the Act are totally unrelated to water pollution control[3] and are singularly and solely land use control and planning devices. These provisions require that: (1) prime farmland be defined as set forth in regulations of the Secretary of Agriculture, § 701(20), without regard to what is actually prime farmland within a State based on State determined land use policies; (2) mined prime farmland be returned to farming use after mining as a condition to allowing surface

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[1] As the Secretary notes, Jurisdictional Statement at 3 [hereinafter cited as "JS"], Indiana has submitted a State Program; however, as found by the General Assembly, the State of Indiana was "coerced" into enacting enabling legislation so that an Indiana program would comport to the Surface Mining Act only to avoid the "Federal encroachment." IND. CODE § 13-4.1-1-1(2) and (4) (Supp. 1980); Conclusion No. 1, JS App., at 27a.

[2] The "prime farmland provisions" are set forth at JS App., at 8a-10a, and are hereafter referred to collectively as such.

[3] The prime farmland provisions actually *increase* water pollution. Finding No. 8, JS App., at 16a.

mining on prime farmland, and (3) the postmining land use be farming for up to ten years.[4] These land use control policies will be effectuated in Indiana through a State Program meeting Federal requirements, or directly usurped through a Federal Program formulated and administered by the Federal Government.

Further land use policy concepts contained in the "approximate original contour," § 515(b)(3), "topsoiling," § 515(b)(5),[5] and prime farmland provisions are demon-

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[4] This farming use is required by the express language of the prime farmland provisions. *See In Re Permanent Surface Mining Regulation Litigation*, No. 79-1144, slip op. at 5, (D.D.C., May 16, 1980):

> Illinois attacks the Secretary's regulation that requires an operator to designate cropland as the post-mining land use for prime farmland. 30 C.F.R. § 785.17(d)(1). . . . Illinois believes that Section 515(b)(2) of the Act . . . affords the operator an open ended choice as to the post-mining land use.
>
> Illinois mistakenly reads Section 515(b)(2) in isolation. . . . But the Act prescribes additional and specific requirements for prime farmland. For example, the SMCRA prohibits release of bond "until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area . . ." Section 519(c)(2) of the Act. . . . This equivalency standard could not be achieved absent the post-mining employment of prime farmland as cropland.
>
> Section 510(d)(1) . . . corroborates the imposition of an additional requirement for mining on prime farmland: the land must be reclaimed and used as crop land.

The required farming use results, in part, because it will take up to ten years of continuous farming to make the demonstrations required for the release of the bond pursuant to § 519(c). The Secretary admitted this fact in his comments to the proposed regulations, 30 C.F.R. § 823.15. See comments set forth in Conclusion No. 5, JS App., at 30a.

[5] Section 515(b)(3) [hereinafter "original contour provision"] requires that mined land be returned to its approximate original contour after mining. Section 515(b)(5) [hereinafter "topsoiling provision"] provides that the topsoil of mined land must be removed, stored and replaced in a separate layer.

strated by the absence of variances from these requirements as applicable to Indiana. For example, where mining occurs on "mountaintops" or "steep slopes" which are not present in Indiana, the Act provides for variances from the original contour requirement if other than the original contour is compatible with a proposed postmining land use which is deemed by the regulatory authority to be an "equal or better economic or public use of the affected land, as compared with premining use," §§ 515(c)(3)(A), (e)(3)(A). The Act allows no meaningful variances from the original contour, topsoiling, and prime farmland provisions for lands in the Midwest, even where these requirements are unnecessary to the attainment of a particular postmining land use, as residential, industrial or recreational uses. In other words, variances are allowed only where the Federal Government has predetermined that there can be an "equal or better economic or public use" of the local land. Variances are not allowed in the Midwest because the Federal Government has predetermined that there is no higher and better use of the land following mining, and in the case of prime farmland, that the highest and best use is farming.

That the absence of variances from the original contour, topsoiling and prime farmland provisions as applicable to Indiana is based on land use policy decisions, not pollution control, is demonstrated in the history of the Act. It was expressly noted that surface mining presents an opportune time for land use planning by reshaping the land,[6] but that variances from the prescribed standards were only permitted where the Federal Government predetermined that higher postmining land uses would result.

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[6] See Conclusion No. 13, JS App., at 34a.

A uniform variance based on land uses was provided from the original contour requirements for all lands, not just steep slopes or mountaintops, at the time the Act was originally passed by the Senate. See § 415(d), 123 CONG. REC. S8,182; 123 CONG. REC. S8,170, (May 20, 1977). Such variances were deemed required based on land use planning considerations:

> [T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably—without rigid contour requirements—there is no reason why further beneficial land uses cannot be carried out on reclaimed land. . . .
>
> . . . .
>
> It must be borne in mind that protection of environmental values does not in every instance require return to an original contour. 123 CONG. REC. S8,101 (daily ed. May 20, 1977) (remarks of Sen. Byrd).

However, in the Committee of Conference, without any rational basis, the uniform land use variance from the "rigid" contour provisions, based on land uses, was restricted to only steep slopes and mountaintops, §§ 515(c)(3)(A), (e)(3)(A), which are not found in the Midwest. Again, the predetermined Federal land use policy is that in the Midwest, land uses which could result from such variances are deemed not to be equal or better land uses.

These predetermined Federal land use policies effectuated through the absence of variance provisions are most blatant in the case of the prime farmland provisions. Several Senators remarked at the time of their introduction that the mere requirement that land be restored to equal or higher and better use [§ 515(b)(2)] was not considered sufficient for prime farmland, and that in addition a postmining farming use was required:

> [T]hat caveat of a higher or better use [in § 515(b)(2)] is the hooker. This is the loophole you can drive a truck through. I shall tell you why.
>
> The effect of this amendment [prime farmland provisions] is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. We are giving all that discretionary authority to some bureaucrat.
>
> I do not want to do that. 123 CONG. REC. S8,111 (daily ed. May 20, 1977) (statements of Sen. Culver).

Hence, the absence of variances from the original contour, topsoiling and prime farmland provisions as applicable to the Midwest, particularly Indiana, shows that the Federal Government predetermined that there can be no higher and better land use, regardless of what may be the local land use planning and control policies or needs. The Federal land use control and planning policies will be effectuated in Indiana, again, either by a State Program that conforms to Federal dictates, or by the Federal Government pursuant to a Federal Program for Indiana.

Another blatant example of Federal land use control is found in § 522 of the Act, which dictates that the States adopt specific governmental structures, procedures and criteria for making land use planning and control decisions, on pain of Federal usurpation, in which case the Federal Government will make those policy decisions. This section requires that a specific procedure be established to designate land unsuitable for surface coal mining and delineates the relevant criteria which are totally unrelated to air and water quality, as whether mining is incompatible with "local land use

plans or programs" or affects "fragile or historic lands" where significant damage could result to "important historic, cultural, scientific, and esthetic values . . . ." See § 522(a)(3). A permit will not be issued to mine on land that has been designated unsuitable for surface mining, § 510(b)(4). Again, this land use policy procedure and governmental structure will have to be adopted by a State in its program, or it will be usurped in a Federal Program with the decisions actually being made by the Federal Government. In addition, § 522(e)(4) and (5) create buffer zones prohibiting "surface coal mining operations," see § 701(28), which would encompass such activities as parking vehicles used in the mining operation. As to road relocation and closings, Indiana is mandated to change its governmental structures by which such decisions are presently made by County Commissioners and the Indiana State Highway Commission,[7] or to relinquish its right to make these decisions to the Federal Government.

The District Court also found unconstitutional, JS App., at 10a, 11a, 19a, those provisions of the Act which combine to require specific State governmental structures and standards for approving proposed postmining land uses, irrespective of existing state governmental structures and standards. Through the permitting procedures and reclamation plan requirements of the Act, §§ 506-508, a mine operator must obtain approval to change the postmining use of the land from that which existed before mining, §§ 508(a)(3), (4), 515(b)(19), (20) and 510(b)(1), (2). These provisions resulted in regulations requiring the approval of changes of postmining land use, defining precisely what is deemed to be a change in land use, and establishing ten land

[7] See Conclusion No. 14, JS App., at 34a.

use categories, ranging from "cropland" to "undeveloped land," 30 C.F.R. § 701.5, which read like zoning ordinances. The premining land uses must be determined in accordance with whether the land was properly managed and, further, if the premining use of the land was changed within five (5) years, then the postmining land uses must be compared with the historic use of the land. 30 C.F.R. § 816.133(b). Not only are specific governmental structures and procedures mandated, but specific criteria are established and required by which the approval of the proposed change in postmining land use will be determined. Again, the provisions directly require that the State adopt federally dictated governmental structures and procedures, as well as direct land use planning and control criteria and policies, or those functions will be usurped and performed by the Federal Government pursuant to a Federal Program.

Finally, the prime farmland, topsoiling and original contour provisions, which have no meaningful variances applicable to Indiana, are a part of the federally dictated land use policy of making surface mining an unpreferred land use to underground coal mining and farming, regardless of a State's land use policies and needs.[8]

As the District Court found,[9] all the above provisions are unrelated to the control of air or water pollution, which further supports the conclusion that the land use control and planning dictates of these provisions are not merely "incidental," as the Secretary contends. This conclusion is compelled when it is considered that the Act,

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[8] This policy is expressly set forth in § 101(b) and § 102(c) and (k), as well as other provisions. See Conclusion No. 17, JS App., at 35a.

[9] Findings No. 7, 8, 9, Conclusion No. 2, JS App., at 16a-18a.

in ten separate provisions,[10] contains requirements clearly directed at water pollution control.

1. Ruling On Tenth Amendment Issues Was Correct

The Secretary contends, without focusing on the specific provisions of the Act found unconstitutional by the District Court, that its analysis was erroneous under the Tenth Amendment and *National League of Cities v. Usery*, 426 U.S. 833 (1976), because any land use consequences of the provisions are merely incidental, the regulation of surface coal mining is not an integral governmental function protected by the Tenth Amendment, and the States are not compelled, but only encouraged, to enforce the Act.

The District Court correctly perceived that the specific provisions of the Act addressed were not merely incidentally concerned with land use control and planning, but rather had as their single and sole purpose Federal land use control and planning. [See pp. 3-10 *supra*.] The District Court did not hold that the regu-

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[10] Those provisions are §§ 515(b)(4), (8), (10), (11), (14), (16) and (19). On the basis of these provisions, the regulations promulgated by the Secretary require the use of sediment and treatment ponds to control the four identified water pollutants—iron, manganese, suspended solids and acidity (pH), which are not controlled by any of the provisions challenged by the appellees, and that surface drainage from non-point sources be controlled. All of the foregoing requirements are in addition to or maybe even duplicative of the control of point sources under the national pollutant discharge elimination standards of the Clean Water Act, as amended, 33 U.S.C. § 1251 *et seq.* and particularly § 1362(14). Finding No. 7, JS App., at 16a. See *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), *cert. granted sub nom. EPA v. National Crushed Stone Association*, ... U.S. ....., 62 L.Ed.2d 750 (1980).

lation of surface coal mining was an integral governmental function protected by the Tenth Amendment. Rather, the District Court reasoned that, "Land use control and planning is a traditional or integral governmental function or area of State sovereignty,"[11] essential to the separate and independent existence of the States.

Land Use Planning And Control—An Attribute Of State Sovereignty

As to the Commerce Clause, *National League of Cities* held that Congress may not exercise this "authority in [a] manner" so as to impair "attributes of [State] sovereignty," particularly governmental functions "essential to separate and independent existence" of the States. 426 U.S. at 845. Land use planning and control is such an attribute of State sovereignty.

National League of Cities is but a part of the evolution of "limits imposed by federalism," which evolution must take place "just as our understanding of Congress' power under the Commerce Clause has evolved."[12] Anything short of such balanced evolution will eventually leave but a national constitution, as opposed to a "compoundly federal and national constitution" as intended and actually structured by the Framers.[13]

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[11] Conclusion No. 3, JS App., at 28a.

[12] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). It may be that "experience" and not "logic" or even political philosophy is at the base of the evolution of federalism principles. *California v. United States*, 438 U.S. 645, 648 (1978).

[13] Diamond, *Commentaries on The Federalist*, 86 YALE L.J. 1273, 1282-83 (1977).

If the Commerce Clause extends to local activities which affect commerce "even in the minutest degree,"[14] then Congress quite obviously can extend its powers into areas "never intended" or contemplated by the Framers of the Constitution[15] and the implicit federalism concepts. The concomitant necessity for the evolution of the limits imposed by federalism, particularly on the Commerce Clause power as it affects the attributes of sovereignty of the States, is self-evident.

As but one example—if the postmining land use of prime farmland can be restricted by Congress to farming, which effectively prohibits any other use, including non-commercial uses [based on a negligible effect on interstate commerce], the Commerce Clause will be extended to reach local non-commercial activity, both public and private. Based on the asserted yearly change in use of one million acres of land from agricultural productivity, of which 98% is due to urbanization and water needs and only 2% is due to surface coal mining [the yearly wasted agricultural productivity through the Agricultural Stabilization Program is *200 times more than* the amount affected by surface mining],[16] the Federal Government seeks to mandate land use planning and control on prime farmland. Assuming this to be a substantial adverse effect on interstate commerce so as to support the purported exercise of the Commerce Clause power, then the Federal

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[14] *Maryland v. Wirtz*, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting), *reversed, National League of Cities v. Usery*, 426 U.S. 833 (1976).

[15] *Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting). *See also* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977).

[16] See discussion, pp. 20-24 *infra*. Findings No. 1-6, JS App., at 12a-16a.

Government can exercise land use controls over any change in use of farmland.

This result would propel the Federal Government, even more than in the case at bar, into the heart of urban and water resource land use planning and control—directly into non-commercial State and private activity. This is not, as the Secretary asserts, JS at 17-18, No. 79-1538, an area of private commercial activities differentiated in *National League of Cities*, 426 U.S. at 845, and subject to the dual sovereignty of the States and the Federal Government over which the latter may preempt State law determinations.

As recognized in *National League of Cities*, a "State" is more than merely the location of its capital, but also includes integral governmental functions as fire protection, police protection, sanitation, public health, parks and recreation, as well as hospitals and schools. Land use planning and control is a hybrid of such integral governmental functions and a State's regulation of purely local non-commercial activities on its lands. Even those who would take *National League of Cities* into areas far removed from this Court's analysis acknowledge the special place of land use planning and control to States' separate and independent existence.[17] The essence and experience of land use planning and control transcends its being characterized solely in terms of a power source. It is not merely an exercise of

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[17] Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1232, 1266 n.235 (1977). Most authorities would agree that "Congress cannot deny the States some symbolic corollaries of independent status, some revenue with which to operate, *some sphere of autonomous law making competence* and *some measure of choice in selecting a political structure*." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978) (emphasis added).

the police power reserved to the States by the Tenth Amendment[18] which is also subject to preemption by an exercise of the Commerce Clause power, just as the provision of police and fire protection transcends merely being an exercise of the police power, rising to the level of attributes of State sovereignty.

Land use planning and control is essential to the separate and independent existence of States and their local communities for it is by this means that communities effectuate the nature of their existence. Land use planning and control defines the nature of the existence of a community including its character, environment, and the quality of life by determining whether it will grow or limit its expansion,[19] whether it will encourage industrial development,[20] whether it will seek to preserve historical and natural advantages,[21] whether it will limit population density,[22] and whether there will be agricultural development as opposed to industrial development.[23]

This essence of land use planning and control embodies elements of federalism as the local self-determination of the nature of its existence. This Court

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[18] See *United States v. Darby*, 312 U.S. 100, 124 (1941); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).

[19] *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[20] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[21] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[22] *Agins v. City of Tiburon*, ... U.S. ....., 65 L.Ed.2d 106 (1980).

[23] *Goffinet v. Christian County*, 65 Ill.2d 40, 357 N.E.2d 442 (1976).

in *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975), recognized that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities." These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[24] and derive at least in part because of the very diverse geography, geology and climate among the States and which differences "have all but necessitated the recognition of legal distinctions corresponding to these differences," including principles of federalism. *California v. United States*, 438 U.S. 645, 648 (1978). To remove these government decisions or the hybrid governmental service of land use planning and control from those affected and concerned, is to allow rule by those whose destinies, existence and, therefore, perspective are totally removed from the consequences without accountability. It would cut to the core of principles of federalism.

Land within a State's boundaries is a part of the State. The State's relationship to its lands has been accorded special treatment.[25] More important, land within a State's boundaries is subject to public or State use in

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[24] See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926), where this Court held:

> [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . . Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial developments shall cease at its boundaries, but that the course of such developments shall proceed within definitely fixed lines.

[25] See *Kansas v. Colorado*, 206 U.S. 46, 93 (1907), where it was held, "It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders."

the form of a servitude by which the State can restrict the owner's right to use the property for the benefit of the State and its citizens without a "taking" occurring, in part because of the presumed local benefit-burden resulting from land use planning and control.[26] Land use control and planning is in fact a State's use of its land based on a quasi-property interest which is a part of the "States as States." For the Federal Government to regulate this State use of land is to regulate the "States as States."

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of federalism is the protection afforded the property rights which cannot be "taken for public use, without just compensation." It is the presumed local benefit-burden resulting from land use planning and control which prevents a "taking"[27] and again emphasizes the elements of self-determination and accountability within federalism concepts. To allow the Federal Government under the Commerce Clause to dictate land use control and planning concepts would so dilute the local benefit, leaving only the burden, as to impinge directly upon Fifth Amendment rights.

This hybrid governmental service of land use planning and control through a State's use of its lands for the benefit of its citizens in today's urbanized society is one of the most essential attributes of sovereignty possessed by the State of Indiana and its political subdivisions. Indeed, in the case at bar, the Secretary has never argued to the contrary.

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[26] See *Agins v. Tiburon*, ... U.S. ....., 65 L.Ed.2d 106, 113 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 134-35 (1978).

[27] *Id.*

Encouragement Versus Coercion

Quite to the contrary of the Secretary's assertions that the Act only "encourages the States to enforce the Act," and that "there is no statutory requirement that the states enforce any particular standard," JS at 18, No. 79-1538, the Act in the various provisions challenged operates directly on the States through §§ 503 and 504 to compel the States by threatened Federal usurpation not only to enforce the Act, but to exercise their legislative and executive powers. These sections require that either a State Program contain statutes and regulations comporting fully with the Act and the Secretary's regulations, § 503(a)(1), (7), or there will be Federal usurpation through a Federal Program administered by the Federal Government, § 504(a).

As found by the District Court, regardless of whether Indiana chooses to adopt Federal land use policies as well as the dictated governmental structures, procedures and criteria for other land use policy decisions mandated by the Act, or abdicates these functions to the Federal Government, the issues are the same. Unless the Federal Government has the power to make directly these land use decisions as under the prime farmland provisions or to assume the role as decision-maker under the procedure for declaring lands unsuitable, § 522, the fact that a State "chooses" to adopt these provisions in a State Program to avoid the usurpation by the Federal Government is irrelevant.

These conclusions are compelled by *National League of Cities* and *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1936). In *National League of Cities* the Federal Government did not directly mandate or control State policies in the areas of fire protection, police protection, sanitation, parks, recreation, schools and hospitals. Yet the indirect infringement on State policy

decisions in these governmental services traditionally delivered by the States was held to be contrary to the Tenth Amendment and other federalism concepts implicit in the Constitution. Had the Federal Government directly usurped the State governmental services, or directly mandated that the States perform these governmental services pursuant to federally dictated policies, there can be no doubt that the transgression of Tenth Amendment and federalism concepts would have been even more severe. This is the "choice" in the case at bar—States can change their policies to those dictated by Congress, or the Federal Government will usurp the functions. To state that such is a "choice" is a perversion of the word.

Similarly, this Court acknowledged in *Steward Machine Company* that Federal statutes are void "as involving the coercion of States in contravention of the Tenth Amendment," if two propositions are "made out by the assailant:"

> There must be a showing in the first place that separated from the credit [as applicable to the case at bar, the required State Program] the revenue provisions [as applicable to the case at bar, a Federal Program directly usurping the State functions] are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the States. 301 U.S. at 586.

In other words, if the provisions of the Act which dictate State land use planning and control decisions as well as require State governmental structures, procedures and criteria for land use planning and control decisions cannot be accomplished independently by the Federal Government, it cannot require these of the States on pain of Federal usurpation.

State Versus Federal Interests

The drastic effects of these federally dictated land use policies on Indiana land use planning, even without regard to the federally dictated governmental structures, procedures and criteria, as found by the District Court, JS App., at 21a-25a, are that prime farmland as defined by the Secretary of Agriculture is not prime farmland based on Indiana's land use policies;[28] that the highest and best postmining land use of prime farmland under Indiana land use concepts is not necessarily a farming use; that surface coal mining land use is integrally related to the county government financial well-being in southwestern Indiana to the extent that 50% of one county's total of real and personal property tax revenue is derived from the land use of surface coal mining; and that the electric utilities of Indiana are integrally related to land use of surface coal mining to the extent of purchasing 83% of the Indiana surface mined coal mostly under long-term coal contracts. Furthermore, the result of the federally dictated land use policies will be to displace the surface coal mining land use in Indiana in favor of underground coal mining land use.[29] However, due to the nature of Indiana's underground mineable coal reserves as compared to the reserves of Kentucky and Illinois, this shift will not result in underground mining in Indiana; rather it will shift Indiana surface coal mining into underground mining in Kentucky and Illinois. As in *National League of Cities*, the consequences of the

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[28] The District Court found that the six Indiana counties which produce over 80% of Indiana's coal account for only 5% of its agricultural production. Finding No. 6, JS App., at 15a.

[29] This land use policy was based on the nature of coal reserves in Illinois. Indiana's coal reserves are not the same and do not lend themselves to mining by the underground method, which serves to illustrate the folly of national land use planning. See Conclusion No. 17, JS App., at 35a.

federal intrusion on this attribute of State's sovereignty are in fact disastrous to the separate and independent existence of Indiana.

Assuming that a balancing of Federal and State interests pursuant to *National League of Cities* is required, the State interest is clearly paramount to any Federal interest. The water and air pollution aspects of the Act were not challenged and remain intact. Thus, there are no interstate spill-over effects and a total absence of any national emergency. The prime farmland provisions are directed at a trivial impact on interstate commerce. Finally, the effect under the Act is not short term and there are other available means to protect any Federal interest legitimately involved.

2. Ruling On The Commerce Clause Issues Was Correct

The challenged provisions of the Act were enacted under the Commerce Clause as a result of the asserted effect of surface coal mining on interstate commerce in the form of air and, primarily, water pollution.

In order for an intrastate activity to be subject to regulation under the Commerce Clause, in conjunction with the Necessary and Proper Clause, such activity must have a substantial and adverse effect on interstate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). The judicial focus is on "whether the *particular activity* regulated or prohibited is within the reach of the federal power." *United States v. Darby*, 312 U.S. 100, 120-21 (1941) (emphasis added). With respect to each particular facet of surface mining being regulated, there must be a rational basis in light of the facts and testimony before Congress to support the finding that

the particular facet of surface mining regulated has a substantial and adverse effect on interstate commerce. *Katzenbach v. McClung, supra.* This Court has recognized "that Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968).

Even if a rational basis is found, the inquiry is not complete. The focus under the Necessary and Proper Clause is whether the means chosen by Congress [the challenged provision of the Act] is "plainly adapted to the legitimate end" of alleviating the adverse effect of the particular facet or activity regulated on interstate commerce. Only if such a relationship is found is the provision valid. *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra; M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819).[30]

The Secretary impliedly concedes that the prime farmland provisions of the Act are not related in any way to the alleviation of air or water pollution, and seeks to sustain such provisions because of some asserted effect of surface mining on agricultural productivity and, therefore, on interstate commerce, JS at 10. Contrary to the Secretary's mischaracterization, the District Court did not merely find that surface mining on prime farmland *in Indiana* has a trivial impact on interstate

[30] The fact that other, collateral results will be attained will not invalidate the regulation if, *and only if,* the regulation is otherwise valid, that is, adapted to removing the rationally found substantial adverse effect on interstate commerce. *See Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 163 (1942). Congress may not, " 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.' " *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 326 (1936), quoting *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 423 (1819).

commerce; rather, the District Court found that the record before Congress demonstrated the infinitesimal effect of surface mining on prime farmland *throughout the entire United States.*

The nationwide effect of surface coal mining operations on prime farmland was presented to Congress through the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands* [hereinafter "Report"].[31] The Report included the results of a 1975 study conducted by the Soil Conservation Service, which found that the Nation contains a total of 384,000,000 acres of prime farmland, of which 65% was used for cropland with approximately 134,000,000 acres of prime farmland not in cropland use.

Further studies were conducted based upon the annual production of surface coal mining in the United States in 1977. The studies showed that only 21,800 acres of prime farmland are disturbed by surface mining each year, which constitutes only 0.006% of the total prime farmland in the United States. Thus, it would take 166 years for surface mining to disturb even 1% of the total prime farmland in the Nation.

It was concluded that even if all the prime farmland affected by surface mining in 1977 came entirely out of corn production, the annual effect based on the 1976/77

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[31] The Interagency Task Force Report was prepared by Office of Management and Budget, Soil Conservation Service, Bureau of Mines, Federal Energy Administration and the Environmental Protection Agency. It was presented to Congress with a report entitled *Restoring Soil Productivity On Surface-Mined Land*, Johnson, McCormick and Samson (1977), which was presented to the House Committee at *Briefing Presentation By The Soil Conservation Service Before The Committee On Interior And Insular Affairs*, U.S. House of Representatives, April 5, 1977, JS App., at 12a-13a.

crop year would have been less than 0.04%. In comparison, the Federal Government through the Agricultural Stabilization and Conservation Service is paying farmers *not* to grow crops on 5,900,000 acres, which is 200 times the amount of prime farmland disturbed annually be surface coal mining. Clearly, such *de minimis* effect does not constitutionally justify or "serve as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz, supra,* at 196 n.27.

The Secretary attempts to cloud the issue by ignoring the evidence before Congress and citing only to a general House Report [JS at 10 & n.6], which contains no facts, and to the remarks of a Senator in floor debates.[32] However, even the legislative history relied on by the Secretary recognized that there is no such rational basis.

> [D]ata contained in the report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moratorium is not justified. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 185 (1977).

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[32] Senators merely raised questions calling for studies to be conducted concerning the effects of surface mining on prime farmland and, therefore, interstate commerce as, "In addition the amendment directs the Secretary of Agriculture to conduct studies on the general impact of surface mining on agriculture." 123 CONG. REC. S8,104 (1977). See also 123 CONG. REC. S8,112 (1977). In the portions of the record relied on by the Secretary, not a single fact was stated or known by the senators regarding the effect of surface mining on prime farmland and food production or the balance of trade, except for the facts set forth in the Interagency Task Force Report. Furthermore, statements by legislators in floor debates are "not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). Such statements have accordingly been granted little weight by this Court. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969).

The Report concluded that "[t]he United States has ample farmland to meet its domestic needs for the foreseeable future," Report at 6, and that the concern for prime farmland is based merely on the belief of some that "there exists an ethical responsibility to retain as much as possible the existing farmlands of this Nation." *Id.*

The Secretary also contends that the approximate original contour, topsoiling, postmining land use and related provisions of the Act are "rational means" of alleviating environmental pollution, JS at 10, again choosing to ignore the record before Congress as well as the express provisions of the Act and relying on the general statements in one page of a House Report. The District Court found that the original contour, topsoiling, prime farmland, and other land use provisions of the Act are totally unrelated to the enhancement of air and water quality. JS App., at 16a. The Act itself supports this conclusion since the Act also contains other provisions, not challenged by appellees, which are the "means" of enhancing air and water quality.[33] Indeed, the prime farmland provisions actually cause or increase water pollution by increasing sedimentation.

The District Court properly concluded that the challenged provisions of the Act are attempts by Congress to regulate facets of surface coal mining operations which have no substantial adverse effect on interstate commerce, and that each provision is not a means reasonably or plainly adapted to any legitimate end permitted under the Commerce Clause, that is, alleviating substantial adverse effects on interstate commerce.

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[33] See pp. 9-10 & nn.9 and 10 *supra*.

3. Substantive Due Process Issue Correctly Decided

The District Court properly concluded that the prime farmland and approximate original contour provisions are arbitrary, irrational and capricious in situations where such requirements are not reasonably necessary to achieve a particular postmining land use. Contrary to the Secretary's claim, not only does the record support the District Court's conclusion, it is apparent on the face of the Act.

The prime farmland provisions are a graphic example. The costly prime farmland provisions are tantamount to economic waste where compliance with such requirements is unnecessary to the attainment of a particular postmining land use, as industrial, residential, and recreational uses. Further, the prime farmland and original contour requirements are not in any way related to the enhancement of air and water quality. Accordingly, the failure to provide for variances from these provisions, where the requirements are not necessary to a proposed postmining land use, renders these requirements arbitrary, irrational and capricious so as to deprive appellees of substantive due process.[34]

The Secretary's assertion that it was "surely a rational distinction" for Congress to determine that "measures appropriate for steep-slope mines are not necessarily

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[34] To the extent that further factual evidence is necessary to support the District Court's conclusion in light of the irrationality of the challenged provisions on their face, appellees presented unrebutted evidence as to the exorbitant costs being incurred by appellee coal companies as a result of the provisions of the Act that are unrelated to air and water quality, which include the prime farmland and approximate original contour provisions. Finding No. 8, JS App., at 24a-25a. It is because of such costs that Indiana surface mined coal, 83% of which is sold to Indiana utilities, has lost its competitive edge over Illinois underground mined coal being purchased by Indiana utilities. *Id.*

desirable in prime farmland areas," JS at 12, merely begs the question. The constitutional test is not merely whether disparate treatment is rational in the abstract; it is whether there is an overriding national interest justifying the difference in treatment and whether there is "a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). Where the discriminatory provisions are enacted pursuant to the Commerce Clause power and the Necessary and Proper Clause, the difference in treatment must be justified by a substantial and adverse effect on interstate commerce. See pp. 20-21 *supra*. The Secretary carefully avoids addressing the foregoing analysis. The District Court properly concluded that there is no overriding national interest which justified the lack of variances for the prime farmland and original contour provisions on lands within the Midwest and particularly Indiana.

The Secretary seeks to overturn the District Court's decision merely by arguing that geographical conditions vary from State to State and, therefore, Congress can regulate differently in light of local conditions. But Congress has allowed variances for the approximate original contour provision in steep slope and mountaintop areas not simply because of the geographical nature of such areas; it has provided for variances in those areas only where it deems that something other than the approximate original contour will result in what it considers to be a higher or better postmining land use. Thus, it has not allowed variances based on geographical conditions, but on the use of the land following mining. Yet Congress did not provide for such variances in light of land uses in the Midwestern States. In other words, it is apparent on the face of the Act that the difference in treatment is not based upon geographical factors; it is based exclusively on land use control considerations.

4. Taking Issue Correctly Decided

In addition to finding parts of § 522 of the Act invalid as constituting a "taking" without just compensation, the District Court also found that the prime farmland requirements[35] constitute a taking of property without just compensation in violation of the Fifth Amendment. JS App., at 40a-42a.

It is technologically impossible to reclaim prime farmland to its premining yield under high levels of management. Consequently, mine operators will not be able to demonstrate that the land can be reclaimed to its prior productivity in order to obtain a permit to mine on prime farmland. The record also demonstrates that appellee coal companies own coal rights under prime farmland and intend to mine the same. Since the coal companies cannot make the requisite showing, they will not be able to mine such land. The coal companies' mineral interests will be destroyed. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Accordingly, the coal companies' property will be taken without just compensation.

5. Procedural Due Process Issue Decided Correctly

The District Court properly ruled that § 518(c) violates procedural due process guarantees by requiring

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[35] The provisions involved are those which require that, before a permit will be granted for surface mining on prime farmland, the regulatory authority must find that the operator has the technological capability to restore such land to equivalent levels of yield, § 510(d)(1), that the prior productivity of the land under "high levels of management" be set forth in the reclamation plan as the target yield, § 508(a)(2)(C), and that a bond on prime farmland may not be released until the soil productivity has been returned to equivalent levels of yield as nonmined prime farmland in the surrounding area under equivalent management practices, § 519(c)(2).

mine operators charged with a violation of the Act to prepay the proposed civil penalty in order to obtain a hearing, see *Fuentes v. Shevin*, 407 U.S. 67 (1972), thereby being forced to purchase their due process rights.

The only exception to the constitutional requirement that persons be given an opportunity for a hearing before their property is taken, is where there is a valid governmental interest that justifies postponing the hearing until after their property is taken. See *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). There is no such exigency in this case. The only asserted interest is one of administrative convenience in that if, following a hearing, it is determined that a violation did occur, the Federal Government need take no further measures to collect the penalty. There is simply no authority for the proposition that personal constitutional guarantees can be swept aside for the mere sake of administrative or bureaucratic convenience.[36] Therefore, the District Court

[36] The constitutional infirmity inherent in § 518(c) is not cured by the fact that the Secretary's regulations provide an opportunity for a "conference" before the proposed penalty must be paid into escrow. Such an informal conference cannot in any way be characterized as a meaningful opportunity for a hearing where it is held before the same "prosecutor" which has alleged the violation in the first place.

Furthermore, the fact that the "refund-with-interest" requirement in § 518(c) may mean that mine operators who are subsequently found not to have violated the Act will suffer no financial injury is irrelevant. It is the deprivation of property prior to a hearing that draws the Fifth Amendment's safeguards to bear, not whether the person deprived comes out with a loss at the end. Moreover, in light of the fact that civil penalties can range up to $5,000 per violation, and each day of continuing violation can be deemed to be a separate violation for purposes of the assessment of a penalty, § 518(a), alleged violators face the potential hardship of coming up with thousands of dollars in order to purchase their due process rights. That such sums may be returned with interest after a hearing does not avoid the hardship of having to come up with that huge amount in the first place.

properly concluded that § 518(c) violates the procedural due process requirements of the Fifth Amendment.

CONCLUSION

The District Court's decision was correct in all respects and, accordingly, should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 101(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201(b) (Supp. 1979), provides:

> **§ 1201. Congressional findings**
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> The Congress finds and declares that—
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> * * *
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> (b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

Sections 102(c) and (k) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(c) and (k) (Supp. 1979), provide:

> **§ 1202. Statement of purpose**
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> It is the purpose of this chapter to—
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> * * *
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> (c) assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;
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> * * *

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

* * *

Section 503(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1253(a) (Supp. 1979), provides:

§ 1253. **State programs—Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness**

(a) Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth-month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this chapter, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this subchapter for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 1272 of this title provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.

Section 504(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254(a) (Supp. 1979), provides:

§ 1254. Federal programs—Promulgation and implementation by Secretary for State

(a) The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty-four months after August 3, 1977, if such State—

(1) fails to submit a State program covering surface coal mining and reclamation operations by the end of the eighteen-month period beginning on August 3, 1977;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program: *Provided*, That the Secretary shall not implement a Federal program prior to the expiration of the initial period allowed for submission of a State program as provided for in clause (1) of this subsection; or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this chapter.

If State compliance with clause (1) of this subsection requires an act of the State legislature, the Secretary may extend the period of submission of the State program up to an additional six months. Promulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this chapter. After promulgation and implementation of a Federal program the Secretary shall be the regulatory authority. If a Federal program is implemented for a State, section 1272(a), (c), and (d) of this title shall not apply for a period of one year following the date of such implementation. In promulgating and implementing a Federal program for a particular State the Secretary shall take into consideration the nature of that State's terrain, climate, biological, chemical, and other relevant physical conditions.

Section 510(b)(1), (2), (4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1620(b)(1), (2), (4) (Supp. 1979), provides:

§ 1260. Permit approval or denial—Basis for decision; notification of applicant and local government officials; burden of proof

Requirements for approval

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

* * *

(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 1272 of this title or is not within an area under study for such designation in an administrative proceeding commenced pursuant to section 1272(a)(4)(D) or section 1272(c) of this title (unless in such an area as to which an administrative proceeding has commenced pursuant to section 1272(a)(4)(D) of this title, the operator making the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit);

Section 515(a) and (b)(2), (4), (8), (10), (11), (12), (14) and (16) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(a) and (b)(2), (4), (8), (10), (11), (12), (14) and (16) (Supp. 1979), provides:

> **§ 1265. Environmental protection performance standards—Permit requirement**
>
> (a) Any permit issued under any approved State or Federal program pursuant to this chapter to conduct surface coal mining operations shall require that such surface coal mining operations will meet all applicable performance standards of this chapter, and such other requirements as the regulatory authority shall promulgate.
>
> **General standards**
>
> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to—
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> * * *
>
> (2) restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law;
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> * * *

(4) stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution;

* * *

(8) create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated that—

(A) the size of the impoundment is adequate for its intended purposes;

(B) the impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under section 1006 of Title 16;

(C) the quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream;

(D) the level of water will be reasonably stable;

(E) final grading will provide adequate safety and access for proposed water uses; and

(F) such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial recreational,[1] or domestic uses;

* * *

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to—

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters;

(B)(i) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law;

(ii) constructing any siltation structures pursuant to subparagraph (B)(i) of this subsection prior to commencement of surface coal mining operations, such structures to be certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan;

(C) cleaning out and removing temporary or large settling ponds or other siltation structures from drainways after disturbed

areas are revegetated and stabilized; and depositing the silt and debris at a site and in a manner approved by the regulatory authority;

(D) restoring recharge capacity of the mined area to approximate premining conditions;

(E) avoiding channel deepening or enlargement in operations requiring the discharge of water from mines;

(F) preserving throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semiarid areas of the country; and

(G) such other actions as the regulatory authority may prescribe;

(11) with respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine working or excavations, stabilize all waste piles in designated areas through construction in compacted layers including the use of incombustible and impervious materials if necessary and assure the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of this chapter;

(12) refrain from surface coal mining within five hundred feet from active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners: *Provided*, That the regulatory authority shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if (A) the nature, timing, and sequencing of the approximate coincidence

of specific surface mine activities with specific underground mine activities are jointly approved by the regulatory authorities concerned with surface mine regulation and the health and safety of underground miners, and (B) such operations will result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public;

* * *

(14) insure that all debris, acid-forming materials, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and the contingency plans are developed to prevent sustained combustion;

(16) insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations: *Provided, however,* That where the applicant proposes to combine surface mining operations with underground mining operations to assure maximum practical recovery of the mineral resources, the regulatory authority may grant a variance for specific areas within the reclamation plan from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

(A) if the regulatory authority finds in writing that:

(i) the applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(ii) the proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(iii) the applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(iv) the areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(v) no substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this chapter;

(vi) provisions for the off-site storage of spoil will comply with paragraph (22) of this subsection;

(B) if the Secretary has promulgated specific regulations to govern the granting of such variances in accordance with the provisions of this subsection and section 1251 of this title, and has imposed such additional requirements as he deems necessary;

(C) if variances granted under the provisions of this subsection are to be reviewed by the regulatory authority not more than three years from the date of issuance of the permit; and

(D) if liability under the bond filed by the applicant with the regulatory authority pursuant to section 1259(b) of this title shall be

for the duration of the underground mining operations and until the requirements of this subsection and section 1269 of this title have been fully complied with.

Section 515(c) and (e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(c) and (e) (Supp. 1979), provides:

§ 1265. Environmental protection performance standards—Permit regulation

* * *

Procedures; exception to original contour restoration requirements

(c)(1) Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit surface mining operations for the purposes set forth in paragraph (3) of this subsection.

(2) Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b)(3) or (d)(2) and (3) of this section may be granted for the surface mining of coal where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill (except as provided in subsection (c)(4)(A) hereof) by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accord with the requirements of this subsection.

(3) In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is proposed for the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) of this section where—

(A) after consultation with the appropriate land use planning agencies, if any, the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use;

(B) the applicant presents specific plans for the proposed postmining land use and appropriate assurances that such use will be—

(i) compatible with adjacent land uses;

(ii) obtainable according to data regarding expected need and market;

(iii) assured of investment in necessary public facilities;

(iv) supported by commitments from public agencies where appropriate;

(v) practicable with respect to private financial capability for completion of the proposed use;

(vi) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and

(vii) designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site;

(C) the proposed use would be consistent with adjacent land uses, and existing State and local land use plans and programs;

(D) the regulatory authority provides the governing body of the unit of general-purpose government in which the land is located and any State or Federal agency which the regulatory agency, in its discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty days to review and comment on the proposed use;

(E) all other requirements of this chapter will be met.

(4) In granting any permit pursuant to this subsection the regulatory authority shall require that—

(A) the toe of the lowest coal seam and the overburden associated with it are retained in place as a barrier to slides and erosion;

(B) the reclaimed area is stable;

(C) the resulting plateau or rolling contour drains inward from the outslopes except at specified points;

(D) no damage will be done to natural watercourses;

(E) spoil will be placed on the mountaintop bench as is necessary to achieve the planned postmining land use: *Provided*, That all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section;

(F) insure stability of the spoil retained on the mountaintop and meet the other requirements of this chapter;

(5) The regulatory authority shall promulgate specific regulations to govern the granting of permits in accord with the provisions of this subsection, and may impose such additional requirements as he deems to be necessary.

(6) All permits granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the applicant affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the approved schedule and reclamation plan.

* * *

Variances to original contour restoration requirements

(e)(1) Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit variances for the purposes set forth in paragraph (3) of this subsection, provided that the watershed control of the area is improved; and further provided complete backfilling with spoil material shall be required to cover completely the highwall which material will maintain stability following mining and reclamation.

(2) Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a variance from the requirement to restore to approximate original contour set forth in subsection (d)(2) of this section may be granted for the surface mining of coal where the owner of the surface knowingly requests in writing, as a part of the permit application that such a variance be granted so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities) in accord with the further provisions of (3) and (4) of this subsection.

(3)(A) After consultation with the appropriate land use planning agencies, if any, the potential use of the affected land is deemed to constitute an equal or better economic or public use;

(B) is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site; and

(C) after approval of the appropriate state environmental agencies, the watershed of the affected land is deemed to be improved.

(4) In granting a variance pursuant to this subsection the regulatory authority shall require that only such amount of spoil will be placed off the mine bench as is necessary to achieve the planned

postmining land use, insure stability of the spoil retained on the bench, meet all other requirements of this chapter, and all spoil placement off the mine bench must comply with subsection (b)(22) of this section.

(5) The regulatory authority shall promulgate specific regulations to govern the granting of variances in accord with the provisions of this subsection, and may impose such additional requirements as he deems to be necessary.

(6) All exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan.

Section 518(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(a) (Supp. 1979), provides:

§ 1268. Penalties—Civil penalties for violations of permit conditions and provisions of this subchapter

(a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 1252 of this title or during Federal enforcement of a State program pursuant to section 1271 of this title, any permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 1271 of this title, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given

to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Section 701(28) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28) (Supp. 1979), provides:

§ 1291. Definitions

* * *

(28) "surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ per centum of the tonnage of minerals removed for

purposes of commercial use or sale or coal explorations subject to section 1262 of this title; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entry-ways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; and

* * *